United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

77-1060

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

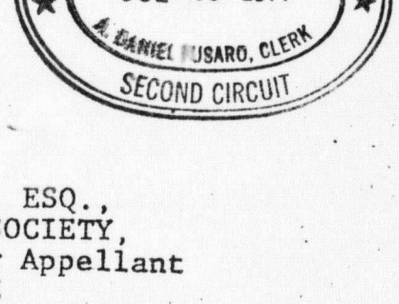
-against-

ORLANDO DIAZ,

Defendant-Appellant.

Docket No. 77-1060

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- ORLANDO DIAZ, Defendant-Appellant.	Docket No. 77-1060

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Appellant Orlando Diaz seeks rehearing with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment of a panel of this Court (Moore, Smith, and Mulligan, C.JJ.)* dated July 11, 1977. The judgment affirmed a judgment of conviction rendered by the United States District Court for the Southern District of New York (Brieant, D.J.) for conspiracy to distribute and possess cocaine (Count One) and its actual possession and

*A copy of this Court's order is annexed hereto as A.

distribution (Count Three), in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846; 18 U.S.C. §2.

The principal issue raised on this appeal is whether a Government affidavit which falsely stated that no photographic "spread" had been employed to identify appellant deprived him of a reasonable opportunity, at both a Wade hearing and at trial, to challenge the identification testimony linking him with the crime.

An indictment filed June 25, 1976, charged appellant with having sold cocaine to an undercover police officer on June 28, 1974 (Count Three) and with having conspired to commit that crime. On March 15, 1976, almost two years after the events in question, appellant was arrested for the offense.

The record shows that by notice of motion dated August 10, 1976, appellant moved for a hearing "regarding the procedures used to identify Orlando Diaz" (Document #3 to the Record on Appeal). Citing United States v. Wade, 338 U.S. 218 (1967), and its progeny, appellant contended that an identification hearing was especially critical in this case in light of the two-year lapse between the crimes charged and appellant's arrest and indictment.* Trial counsel's supporting affidavit concluded:

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*On the basis of a complaint filed July 14, 1975, appellant was arrested on March 15, 1976, almost two years after the events in question.

> Considering the long delay between the events and the arrest, and the consequent possibility of misidentification, a hearing should be held to determine under what circumstances the identification was made.
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> Document #3, Record on Appeal.

The Government opposed the motion, arguing that Wade and other related cases were inapplicable, since no line-up or photographs had been used in the pretrial investigation. In a sworn affidavit dated August 18, 1976, the Assistant United States Attorney stated:

> With respect to the identification of Diaz, no line-up was conducted during the investigation of this case. Nor was a photographic spread used. As such, United States v. Wade, 338 U.S. 218 (1967), and its progeny are entirely inapposite.
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> Document #5, Record on Appeal.

On September 13, 1976, Judge Tenney denied the motion "as frivolous" (see endorsement decision, Document #3, Record on Appeal).

Appellant's first trial commenced on October 20, 1976. Two days later a mistrial was declared when, after extensive deliberation, the jurors were unable to reach a verdict.*

The case was reassigned to Judge Brieant, and the retrial began on December 7, 1976.

During the second trial some evidence was introduced indicating that the Assistant United States Attorney's affidavit

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*The Assistant United States Attorney who represented the Government during the motion proceedings and the first trial was not the same prosecutor who handled the retrial.

was false or misleading and that an identification procedure of some sort had, in fact, occurred.* However, the Assistant United States Attorney's prior erroneous affidavit lulled defense counsel into believing that any pretrial identification procedures that had been employed were irrelevant to the issue of the accuracy and suggestiveness of the identification of appellant. Indeed, it is apparent that the Assistant United States Attorney who tried the case was similarly affected since, despite his obligation to correct the misleading effect of the Government's previous misrepresentations, he failed to do so at retrial.

On appeal, appellant Diaz argued that the Government's initial denial that any pretrial photographic procedures had been used to identify appellant, in light of its failure to correct the error, required remand for a hearing to determine what procedures were actually employed and whether a new trial was required as a result. Appellant contended that the lack of knowledge of the procedures used to identify him was prejudicial in at least three respects: first, it precluded

*Thus, on cross-examination, New York City police officer Marrero was asked when he next saw appellant after the events in question. He answered: "I saw a picture of him the following day" (Tr. 76). Another police officer testified that he made "a subsequent investigation regarding the identity of the defendant" (Tr. 209). Further, in a sidebar conference, the prosecutor who tried the case stated that a check through "BCI" resulted in a photograph of appellant (Tr. 167). Finally, at the sentencing proceeding after trial, the prosecutor flatly contradicted the Government's prior representation, stating that "there was an identification made immediately, in fact a day or two days after the incident occurred, as a result of a mug shot" (Tr. 350).

discovery of the photographs used (Appellant's Brief at 13); second, it prevented proper preparation for cross-examination as well as a fair presentation to the jurors of the ultimate issue at trial -- whether the identification of appellant was accurate (Appellant's Brief at 13-14); third, it precluded the raising prior to trial of the issues relevant to a Wade hearing (Appellant's Brief at 13).

In response, the Government confirmed that an identification procedure had occurred* and that the affidavit was, in fact, misleading, but argued that the sole purpose of any hearing would be for the purpose of determining whether the photographic procedures "created 'a very substantial likelihood of irreparable misidentification'" and that such a hearing should be denied (Government Brief at 11-16).

Oral argument was heard on May 20, 1977, and this Court reserved decision. By order dated July 11, 1977, the Court affirmed the judgment of conviction, citing Manson v. Brathwaite, ___ U.S. ___, 45 U.S.L.W. 4681 (U.S. June 16, 1977).

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*For the first time, the Government represented on appeal that pretrial identification procedures consisted of three New York City police officers checking the "BCI" police file under appellant's name, finding in the file a photograph of appellant, and showing that photograph to the informant who had introduced the co-defendants to the officers (Government Brief at 7). However, these events have never been the subject of any factfinding hearing. Given the accuracy of the Government's prior representations in a sworn affidavit, this statement should not be accepted as a substitute for such a hearing. Moreover, even if these were the only pretrial identification procedures employed, the special circumstances under which they were conducted have never been revealed or explored.

ARGUMENT

THIS COURT'S CITATION OF MANSON v. BRATHWAITE, 45 U.S.L.W. 4681 (June 16, 1977), AS DISPOSITIVE OF THIS CASE INDICATES THAT THIS COURT MAY HAVE MISAPPREHENDED APPELLANT'S CLAIM ON APPEAL.

On appeal, appellant Diaz argued that the lack of knowledge of the pretrial photographic identification procedures precluded, inter alia, appropriate discovery procedures, proper preparation for cross-examination, the fair presentation to the jurors of whether the identification of appellant was accurate and reliable, and a challenge to the possible independent source of the identification testimony. This Court's citation of Manson v. Brathwaite reflects either a misapprehension of the nature of appellant's claim or a fundamental misinterpretation of that case.

In Manson, the Supreme Court held that certain suggestive out-of-court photographic identification procedures were admissible at trial. Id., 45 U.S.L.W. at 4685. To the extent that this holding is relevant here, it might enable this Court to uphold the admissibility of the identification testimony adduced at trial.* However, this still leaves unanswered the

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*Even if this were the case, however, a hearing out of the jurors' presence would still be required to explore the question of reliability and irreparable misidentification. Manson v. Brathwaite, supra, 45 U.S.L.W. at 4685.

other, more important aspect of the claims raised on appeal.

Indeed, Manson itself indicates that increased reliance will be placed on the jury's ability to decide identification questions even when unnecessarily suggestive procedures are in evidence. Manson v. Brathwaite, supra, 45 U.S.L.W. at 4685 n.14.

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.
>
> Id., 45 U.S.L.W. at 4686.

Given the increased importance of the jurors' determination, it is simply impermissible to prevent defense counsel from gaining the necessary information that would allow him to present the question fairly. And without full presentation of the identification question, the verdict gives no assurance that the jury correctly determined the issue of guilt or innocence, and invites conviction of the innocent.

Knowledge of the Government's pretrial photographic identification procedures was necessary in planning trial strategy, properly preparing cross-examination of the Government's witnesses, and testing their accuracy and reliability. Cf. United States v. Durant, 545 F.2d 823, 829 (2d Cir. 1976) (new trial required so that fingerprint expert could supply defense counsel with information "to use as [counsel] sees fit"); see Napue v. Illinois, 306 U.S. 264, 269 (1959); United States v. Consolidated Laundries, 291 F.2d 563, 570 n.10 (2d Cir. 1961). Yet

such knowledge was denied the defense by the Government's erroneous affidavit. Moreover, the non-disclosure of the pretrial procedures used precluded discovery by the defense of the photographs used. See Rule 16(a)(1)(c), Federal Rules of Criminal Procedure.

Most important, knowledge of any photographic display was critical to the weight to be accorded to the identification testimony as well as to the jurors' ultimate determination of whether the identification of appellant was accurate and reliable or whether this was a case of irreparable misidentification.

The Government's case depended entirely on identification testimony. The only evidence* of appellant's participation in the crimes charged was the New York City police officers' testimony that they had seen appellant for an extremely brief period of time on a day almost two and one-half years prior to trial, and could still identify him. As the district court said, identification was "probably the only question in the case..." (Tr.171), while defense counsel told the jurors that the main issue was whether this case was one of "mistaken identity" (Tr.15, 243, 250, 256-257). Knowledge that pretrial

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*While the proof which showed that the car used during the course of the crime had license plate number 699XIC and was registered to Orlando Diaz, the probative value of this testimony was totally undercut by the fact that the car registered to Orlando Diaz was a four-door sedan, while the police officers testified that the car seen on June 28, 1974, was a station wagon.

identification procedures had been employed and that photographs had been seen by those who later identified appellant at trial was critical to the defense. While this Court's citation to Manson v. Brathwaite, supra, indicates that the identification testimony here was admissible, appellant's claim on appeal was not directed solely to this issue, but also to the Government's misrepresentation about the pretrial identification procedures used and the prejudice caused by the defense's lack of knowledge about them.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,

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JONATHAN J. SILBERMANN,
Of Counsel.

July 25, 1977

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of July one thousand nine hundred and seventy-seven.

Present:

HON. LEONARD P. MOORE

HON. J. JOSEPH SMITH

HON. WILLIAM H. MULLIGAN

Circuit Judges,

UNITED STATES OF AMERICA, Appellee, -against- ORLANDO DIAZ, Appellant-Defendant.	77-1060

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of conviction of said District Court be and it hereby is affirmed. See Manson v. Brathwaite, ___U.S. ___, 45 U.S.L.W. 4681, (U.S. June 16, 1977).

Leonard P. Moore

Leonard P. Moore

J. Joseph Smith